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9 JASON EDWARD THOMAS CARDIFF

10
11 UNITED STATES DISTRICT COURT
12 CENTRAL DISTRICT OF CALIFORNIA

13 UNITED STATES OF AMERICA,

14 Plaintiff,

15 vs.

16 JASON EDWARD THOMAS
CARDIFF,

17 Defendant.
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Case No. 5:23-CR-00021-JGB

Hearing Date: January 13, 2024

Courtroom: 1

Time: 2:00 p.m.

1 **I. INTRODUCTION**

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3 The Government’s Memorandum in Opposition to the Defendant’s Motion to
4 Dismiss Counts 3 and 4 misinterprets the requirements of 18 U.S.C. § 1512(b)(2)(B)
5 and misapplies case law regarding the definition of an “official proceeding.” The
6 Government conflates different processes—the FTC’s Civil Investigative Demand
7 (CID), the enforcement of the CID, with the FTC litigation—none of which satisfy the
8 statutory nexus and intent requirements established in *United States v. Aguilar* and
9 *Arthur Andersen LLP v. United States*.

10 The question of whether these actions qualify as “official proceedings” is a legal
11 matter for the Court to resolve before trial.

12 The government’s arguments fail for three fundamental reasons:

- 13 1. The CID is not an official proceeding as it is a pre-litigation investigative tool
14 that lacks tribunal-like qualities.
- 15 2. The statute requires destruction of evidence that compromises the availability
16 of evidence “for use in an official proceeding.” Neither the CID nor a Petition
17 to Enforce a CID involved evidence that may be “used” in either of those
18 proceedings.
- 19 3. Even *assuming* that the Government had alleged the FTC as an official
20 proceeding in either Counts 3 or 4, the Government cannot prove a nexus
21 between the alleged acts and filing of the FTC lawsuit.
- 22 4. Counts 3 and 4 must be dismissed because the Indictment failed to identify any
23 specific “official proceeding” at issue, the CID, the enforcement action or the
24 FTC lawsuit.

25 For these reasons, Counts 3 and 4 should be dismissed.

26 **II. ARGUMENT**

27 **A. A Civil Investigative Demand (“CID”) Is Not an Official Proceeding**
28 **Under 18 U.S.C. § 1512**

 The government argues that the CID itself constitutes an official proceeding
under 18 U.S.C. § 1512(b)(2)(B). However, the CID expressly states that it is part of

1 an investigatory process, noting that its purpose is to determine whether Redwood
2 Scientific Technologies, Inc. has violated Sections 5 and 12 of the FTC Act” and that
3 “no determination has been made as to whether violations of law have occurred.”
4 **Exhibit A**, Ex. 1. The Government’s claim that the CID was an “official proceeding”
5 when the actual CID says it is an investigation is without merit.

6 Courts have consistently interpreted the term “proceeding” to require a formal,
7 tribunal-like setting. In *United States v. Ermoian*, 752 F.3d 1165, 1172 (9th Cir. 2013),
8 the Court analyzed the statutory language of Section 1515 and held that a proceeding
9 is a word much used to express the business done in courts or by the authority or
10 direction of the court. *Id.* at 1170. Similarly, the Court found that the choice of
11 language “before a Federal Government Agency” would be odd if it referred to criminal
12 investigations. *Id.* “[U]se of the preposition ‘before’ suggests an appearance in front
13 of the agency sitting as a tribunal...In short, a criminal investigation does not occur
14 “before a Federal Government Agency” like a hearing or trial might; it is conducted
15 ‘by’ the agency in the field.” *Id.* For these and other reasons, the Court held that an
16 FBI investigation is not an “official proceeding” within the meaning of Section
17 1515(a)(1)(C).

18 In this case, the CID in this case was simply a pre-litigation discovery
19 mechanism—a tool for gathering information. The mere fact that one of the FTC
20 Commissioners signed a demand to produce documents merely signifies the start of an
21 informal FTC investigation. The Government’s assertion that a CID is an official
22 proceeding must fail because mere issuance of a request to investigate does not
23 transform the request into an official proceeding. *Ermoian*, at 1172.

24 Similarly, a proceeding to enforce a CID is based on the fact that the CID is still
25 a informal investigation and not a determination of culpability under the FTC Act. At
26 each step, a defendant is entitled to presume that the FTC meant what it said—that it
27 was investigating potential violations under the FTC Act. Neither the CID nor the
28 Petition to Enforce the CID establish a nexus under *Aguilar*.

1 **III. Documents Are Not “Used” as Evidence in a CID or in a Petition to**
2 **Enforce a CID.**

3 Under 18 U.S.C. § 1512(b)(2)(B), the government must prove that the
4 defendant’s actions were specifically intended to compromise the integrity or
5 availability of an object “for use in an official proceeding.” The government’s claim
6 that the “object” was meant to be used in a motion to compel the CID is fundamentally
7 flawed. A petition to enforce a CID does not involve the use of the requested documents
8 or physical objects to be introduced into evidence; instead, it focuses solely on whether
9 compliance with the CID is justified. This type of proceeding does not inherently
10 require the presentation, alteration, or concealment of any documents or evidence.
11 Without a logical or factual connection between the object and its potential use in the
12 motion, the statutory requirement—that the object be relevant or necessary to the
13 proceeding—is not satisfied.

14 Additionally, it should be noted that the only official proceeding in this case
15 where the requested documents could be used in an official proceeding was the FTC
16 civil lawsuit. There was no other official proceeding where the evidence could have
17 been or would have been *used*. The government’s argument seeks to extend the statute
18 to a CID and/or motion to enforce a CID is unsupported by both the language of the
19 statute and the facts of the case. Without a direct link between the object and its role in
20 an official proceeding, it is impossible to establish the specific intent required by the
21 statute.

22 **B The Government’s Failure to Establish a Clear Nexus**

23 The government has failed to establish a clear nexus between Mr. Cardiff’s
24 alleged destruction of evidence that could be *used* in any ongoing or foreseeable official
25 proceeding, as required under *United States v. Aguilar*, 515 U.S. 593 (1995). In
26 *Aguilar* held that there must be a clear “nexus” between the alleged act and an official
27 proceeding to establish an obstruction charge. *Id.* at 599. The Court explained that the
28 accused’s actions “must have a relationship in time, causation, or logic with grand jury

1 or judicial proceedings,” and further stated, “it is not enough that there be an intent to
2 influence some ancillary proceeding, such as an investigation independent of the court's
3 or grand jury's authority.” *Id.*

4 Moreover, the Court emphasized that “a person lacking knowledge that his
5 actions are likely to affect a pending proceeding necessarily lacks the requisite intent
6 to obstruct.” *Id.* at 599-600, citing *Pettibone v. United States*, 148 U.S. 197, 206-207).
7 The Court clarified that speculative connections to possible or potential proceedings
8 are insufficient, noting: “What use will be made of false testimony given to an
9 investigating agent who has not been subpoenaed or otherwise directed to appear before
10 the grand jury is far more speculative. We think it cannot be said to have the 'natural
11 and probable effect' of interfering with the due administration of justice.” *Id.* at 601.

12 The obstruction statute demands a direct and concrete connection between the
13 defendant's actions and a specific proceeding. A speculative, possible or tangential
14 relationship does not satisfy this legal standard. Here, the government has provided no
15 evidence to demonstrate that Mr. Cardiff's actions were directly related to or intended
16 to obstruct a pending official proceeding where the allegedly destroyed evidence could
17 be used.

18 At the time of the alleged conduct, in April-May 2018, the FTC was merely
19 investigating and gathering evidence of suspected violations of the FTC Act.
20 Significantly, the Commission had not reviewed the staff's evidence nor had it made
21 any made any decision to initiate litigation. *Indeed, litigation cannot be instituted*
22 *without a review of the staff's evidence and vote by the Commission.* 15 U.S.C. § 53(b).
23 Without a vote by the Commission to escalate the investigation into a civil case, no
24 one—neither Mr. Cardiff nor FTC staff—could have known whether a formal
25 proceeding would occur. Any attempt by Cardiff to try to foresee a lawsuit would have
26 been sheer speculation. The lack of a Commission review and decision renders any
27 claim of foreseeability or intent to obstruct a specific proceeding legally baseless. The
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1 CID and motions to compel relied upon by the government were part of the FTC's
2 investigation, not formal adjudicative processes. These tools are designed to gather
3 information and enforce compliance, not to adjudicate disputes or use evidence to
4 establish culpability in civil or criminal proceedings.

5 The government has not presented evidence that Mr. Cardiff acted with the
6 knowledge or intent to obstruct the civil lawsuit. The requirement of a nexus under
7 *Aguilar* necessitates that the defendant's actions were aimed at a specific proceeding
8 that was either ongoing or foreseeable.

9 The Government asserts that Mr. Cardiff spent a year "defiantly avoiding
10 compliance" with the CID. Dkt. 152 at 20. However, Defendant set out facts in his
11 initial memorandum showing that: (1) Redwood retained a third party provider to assist
12 voluminous documents to the FTC (**Exhibit A**, Cochell Dec., Ex. 6); (2) Redwood
13 produced over 1.6 million documents in response to the CID (Id. at Ex. 6); (3) Tracy
14 Green was working with the FTC to address any real or perceived deficiencies in the
15 production¹; and (4) that a lawsuit was filed apparently when Mr. Cardiff's counsel
16 failed to attend hearings before Judge Otero in September 2018. Dkt 134-1, ¶¶ 7-8.
17 Despite the alleged destruction, the FTC secured a judgment on all 26 counts in its civil
18 lawsuit. Civil Dkt. 706.

19 In conclusion, the government's inability to demonstrate a direct nexus between
20 Mr. Cardiff's alleged conduct and the FTC lawsuit renders the charges under 18 U.S.C.
21 § 1512(b)(2)(B) legally insufficient. The CID and motions to compel were investigative
22 in nature, and there was no formal proceedings pending or foreseeable at the time.
23 Being represented by counsel in a CID enforcement proceeding does not constitute
24 knowledge nor was there any indication in the CID or enforcement proceeding that
25 Defendant must prove a clear nexus between had knowledge that he was going to be
26 sued six months later. The focus was production of documents. Without proof of
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28 ¹ **Exhibit A**, Cochell Dec., Ex. 6

1 intent or a clear nexus, the charges should be dismissed.

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3 **C. Counts 3 and 4 of the Indictment Must be Dismissed Because the**
4 **Government Failed to Allege a Specific “Official Proceeding” Under**
5 **Section 1512.**

6 In its Opposition, the Government, for the first time, revealed that there were
7 several specific proceedings that were the subject of its Indictment. The Indictment in
8 this case simply alleges that Defendant caused and induced certain individuals to
9 destroy emails and electronic evidence “with intent to impair the integrity and
10 availability of the objects for use in official proceedings, namely civil and
11 administrative proceedings before the United States District of California and the
12 United States Federal Trade Commission.” Dkt. 1 at 5-6. In its memorandum in
13 opposition to this motion, the Government identifies no less than three “proceedings”
14 that it characterizes as “official proceedings.” As set out in his initial motion,
15 Defendant believed that the “official proceeding” at issue was the lawsuit filed by the
16 FTC and therefore moved to dismiss Counts 3 and 4. This confusion demonstrates a
17 fatal defect in the Indictment.

18 Fed. R. Crim. P. 7(c)(1) states that an “indictment . . . shall be a plain, concise
19 and definite written statement of the essential facts constituting the offense charged.” It
20 is a basic principle that, in order to guarantee protection of a criminal defendant’s rights,
21 an indictment must “contain[] the elements of the offense intended to be charged, ‘and
22 sufficiently apprise[] the defendant of what he must be prepared to meet,’” *Russell v.*
23 *United States*, 369 U.S. 749, 763 (1962). In *Russell*, the Court found indictments
24 defective which were brought under 2 U.S.C. § 192, which prohibited witnesses before
25 congressional committees from “refus[ing] to answer any question pertinent to the
26 question under inquiry.” The indictments did not identify the “question under inquiry”
27 although they did list the questions the defendants had refused to answer.

28 The Court, in *Russell*, held that:

1 It is an elementary principle of criminal pleading, that where the
2 definition of an offence, whether it be at common law or by statute,
3 'includes generic terms, it is not sufficient that the indictment shall charge
4 the offence in the same generic terms as in the definition; but it must state
5 the species, -- it must descend to particulars.'" *United*
6 *States v. Cruikshank*, 92 U.S. 542, 558. An indictment not framed to
7 apprise the defendant "with reasonable certainty, of the nature of the
8 accusation against him . . . is defective, although it may follow the
9 language of the statute." *United States v. Simmons*, 96 U.S. 360, 362. "In
10 an indictment upon a statute, it is not sufficient to set forth the offence in
11 the words of the statute, unless those words of themselves fully, directly,
12 and expressly, without any uncertainty or ambiguity, set forth all the
13 elements necessary to constitute the offence intended to be
14 punished; . . . " *United States v. Carll*, 105 U.S. 611,
15 612. "Undoubtedly the language of the statute may be used in the general
16 description of an offence, but it must be accompanied with such a
17 statement of the facts and circumstances as will inform the accused of the
18 specific offence, coming under the general description, with which he is
19 charged." *United States v. Hess*, 124 U.S. 483, 487. [citations
20 omitted] That these basic principles of fundamental fairness retain their
21 full vitality under modern concepts of pleading, and specifically
22 under Rule 7 (c) of the Federal Rules of Criminal Procedure, is illustrated
23 by many recent federal decisions.

24 Id. at 765. The Court further noted that a cryptic form of indictment requires the
25 defendant to go to trial with the chief issues undefined. Id at 766. The Court
26 rejected the idea that any deficiency in an indictment could be cured by a bill of
27 particulars. "But it is a settled rule that a bill of particulars cannot save an invalid
28 indictment." Id. at 770.

29 A valid indictment serves two central purposes: (1) it sufficiently apprises
30 the defendant of the charges against him to enable him to prepare a defense; and
31 (2) it allows him to plead jeopardy against a later prosecution. Similarly, the Ninth
32 Circuit has held that "the indictment must allege the elements of the offense
33 charged and the facts which inform the defendant of the specific offense with
34 which he is charged." *United States v. Lane*, 765 F.2d 1376, 1380 (9th Cir.

1 1985). An indictment's failure to "recite an essential element of the charged
2 offense is not a minor or technical flaw . . . but a fatal flaw requiring dismissal
3 of the indictment." *United States v. Du Bo*, 186 F.3d 1177, 1179 (9th Cir.
4 1999). While the language of the statute itself may be used in a general
5 description of the specific offense, it must be accompanied with such a statement
6 of the *facts* and *circumstances* as will inform the accused of the specific offense.
7 *Hamling v. United States*, 418 U.S. 87, 117-118 (1974).

8 In *United States v. Murphy*, 762 F.3d 1151 (1st Cir. 1985), the Court held that
9 failure to identify any proceeding in which defendants allegedly attempted to influence
10 a witness' testimony required dismissal of the indictment. The Court held that: "Crucial
11 to preparation of any defense to a charge under the statute is at least some indication of
12 the identity of the proceeding in which the defendant tried to influence testimony." *Id.*
13 at 1154. Because the indictment made no such indication, it failed to "sufficiently apprise
14 the defendants of what [they] must be prepared to meet." *Id. citing Russell* at 763.

15 IV. CONCLUSION

16 At its core, the Government is attempting to expand the scope of an "official
17 proceeding" under Section 1512(b) by suggesting that the FTC's CID and an
18 enforcement proceeding based on that CID somehow involved destruction of evidence
19 that would be *used* in an official proceeding. Similarly, Defendant cannot be charged
20 with foreseeing an FTC lawsuit simply because the FTC filed an enforcement
21 proceeding. Defendant should not have to guess about whether the Government
22 charged obstruction of a CID, an enforcement proceeding or an FTC lawsuit.
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24 For these reasons, Defendant respectfully requests that the Court dismiss Counts 3
25 and 4 of the indictment with prejudice.

26 **Dated:** December 30, 2024
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2 **Respectfully submitted,**

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5 By: /s/ Stephen R. Cochell
6 Stephen R. Cochell

7 Attorney for Defendant
8 JASON EDWARD THOMAS CARDIFF
9

10 **SERVICE LIST**

11 I HEREBY DECLARE THAT THE FOLLOWING COUNSEL HAVE BEEN
12 SERVED WITH THIS DEFENDANT JASON CARDIFF'S NOTICE OF MOTIO
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